



January 31, 2000

Mr. Christopher Gregg  
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Seabrook, Texas 77062

OR2000-0316

Dear Mr. Gregg:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 131693.

The City of Seabrook (the "city"), which you represent, received a request for the employment application and all personnel information regarding a specific officer. You claim that portions of the requested information are excepted from disclosure under sections 552.101, 552.111, 552.115, and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

First, we consider your arguments concerning section 552.101 of the Government Code. Section 552.101 excepts from required public disclosure "information that is confidential by law, either constitutional, statutory, or by judicial decision." Under common law privacy, private facts about an individual are excepted from disclosure. *Industrial Foundation v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Information may be withheld from the public when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *Id.* at 685; Open Records Decision No. 611 at 1 (1992). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683. However, common law privacy does not apply to embarrassing or intimate information "unless the records [at issue] are also of no legitimate interest to the public." Open Records Decision No. 470 at 4 (1987); *see also* Open Records Decision No. 464 (1987). Furthermore, the public has a genuine interest in information concerning a public employee's job performance and the reasons for dismissal, demotion or promotion. Open Records Decision No. 444 at 5-6 (1986); *see also* Open Records Decision No. 208 (1978) (disciplinary action against public employee available to public).

Moreover, in Open Records Decision No. 373 (1983), we concluded that personal financial information can generally be considered highly intimate and embarrassing:

In our opinion, all financial information relating to an individual — including sources of income, salary, mortgage payments, assets, medical and utility bills, social security and veterans benefits, retirement and state assistance benefits, and credit history — ordinarily satisfies the first requirement of common law privacy, in that it constitutes highly intimate or embarrassing facts about the individual, such that its public disclosure would be highly objectionable to a person of ordinary sensibilities. . . .

However, information regarding a financial transaction between an individual and a governmental body is a matter of legitimate public interest not generally protected from public disclosure by common law privacy. Open Records Decision Nos. 590 at 3 (1991), 523 at 3-4 (1989). For example, the salary of a public employee is not excepted from disclosure. Open Records Decision No. 342 (1982). Further, the doctrine of common law privacy does not generally except from disclosure public employee participation in an insurance program that is funded wholly or partially by his or her employer. Open Records Decision Nos. 600 at 9 (1992). Of course, personal financial information does not meet the test for common law privacy unless it is also of no legitimate interest to the public. In Open Records Decision No. 373 (1983), we concluded that the determination of whether the public's interest in obtaining highly intimate and embarrassing information is sufficient to justify its disclosure must be made on a case-by-case basis.

We find that the submitted employment application contains financial and personal information that is confidential under common law privacy as encompassed by section 552.101. We have marked this information accordingly.

Section 552.101 also encompasses confidentiality provisions regarding criminal history information. Criminal history record information generated by the National Crime Information Center ("NCIC") or by the Texas Crime Information Center ("TCIC") is confidential by statute. Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI that states obtain from the federal government or other states. Open Records Decision No. 565 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *Id.* Section 411.083 of the Government Code deems confidential CHRI that the Department of Public Safety ("DPS") maintains, except that the DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code. *See* Gov't Code § 411.083.

Sections 411.083(b)(1) and 411.089(a) authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice

agency for a criminal justice purpose. *Id.* § 411.089(b)(1). Other entities specified in chapter 411 of the Government Code are entitled to obtain CHRI from DPS or another criminal justice agency; however, those entities may not release CHRI except as provided by chapter 411. *See generally id.* §§ 411.090 - .127. Thus, any CHRI generated by the federal government or another state may not be made available to the requestor except in accordance with federal regulations. *See* Open Records Decision No. 565 (1990). Furthermore, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 of the Government Code in conjunction with Government Code chapter 411, subchapter F. Please note, however, that driving record information is not confidential under chapter 411, *see* Gov't Code § 411.082(2)(B), and must be disclosed. The submitted documents contain confidential CHRI the release of which is governed by chapter 411. We have marked this information.

Section 552.101 also encompasses confidentiality provisions such as section 611.002 of the Health and Safety Code. Chapter 611 of the Health and Safety Code provides for the confidentiality of records created or maintained by a mental health professional. Section 611.002(a) reads as follows:

Communications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential.

Health & Safety Code § 611.002. Section 611.001 defines a “professional” as (1) a person authorized to practice medicine, (2) a person licensed or certified by the state to diagnose, evaluate or treat mental or emotional conditions or disorders, or (3) a person the patient reasonably believes is authorized, licensed, or certified. Sections 611.004 and 611.0045 provide for access to mental health records only by certain individuals. *See* Open Records Decision No. 565 (1990). We find that some of the submitted documents are mental health records that are confidential under section 611.002. We have marked these confidential documents. The city may release them only as provided by sections 611.004 and 611.0045.

The requested information also includes medical records which are subject to section 159.002 of the Occupations Code, known as the Medical Practices Act (“MPA”)<sup>1</sup> in conjunction with section 552.101 of the Government Code. As explained above, section 552.101 encompasses confidentiality provisions such as the MPA. The MPA provides in relevant part:

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<sup>1</sup>The Seventy-sixth Legislature repealed article 4495b of Vernon’s Texas Civil Statutes. *See* Act of May 13, 1999, 76<sup>th</sup> Leg., R.S., ch. 388, § 6, 1999 Tex. Sess. Laws 1431, 2439 (Vernon) (adopting Occupations Code). The former article 4495b of Vernon’s Texas Civil Statutes now is codified as the Medical Practice Act at subtitle B of title 3 of the Occupations Code, and the former section 5.08 of article 4495b is codified at chapter 159 of the Occupations Code.

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter . . . may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

The MPA requires that any subsequent release of medical records be consistent with the purposes for which a governmental body obtained the records. Open Records Decision No. 565 at 7 (1990).<sup>2</sup> Thus, the MPA governs access to medical records. Open Records Decision No. 598 (1991). Moreover, information that is subject to the MPA includes both medical records and information obtained from those medical records. *See* Occ. Code § 159.002(a), (b), (c); Open Records Decision No. 598 (1991). We have marked the medical records that appear in the submitted documents. The county may release these records only in accordance with the MPA.<sup>3</sup>

Section 552.101 also encompasses section 1703.306 of the Occupations Code. Section 1703.306 generally provides:

A polygraph examiner, trainee, or employee of a polygraph examiner, or a person for whom a polygraph examination is conducted or an employee of the person may not disclose information acquired from a polygraph examination to another person . . . .

Occ. Code § 1703.306. While section 1703.306 provides various exceptions to confidentiality, none of the exceptions applies here. Accordingly, the city must withhold the polygraph results that are contained in the submitted documents under section 1703.306 as encompassed by section 552.101 of the Government Code. We have marked this information to be withheld.

The submitted documents also contain motor vehicle information that is confidential under section 552.130 of the Government Code. Section 552.130 excepts from required public disclosure information that relates to a motor vehicle operator's or driver's license or permit

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<sup>2</sup>Inasmuch as the Seventy-sixth Legislature intended no substantive change in the law in codifying the Medical Practice Act at subtitle B of title 3 of the Occupations Code, open records decisions interpreting the former section 5.08 of article 4495b of Vernon's Texas Civil Statutes retain their relevance. *See* Act of May 13, 1999, 76<sup>th</sup> Leg., R.S., ch. 388, § 7, 1999 Tex. Gen. Laws 1431, 2440.

<sup>3</sup>*See* Occ. Code §§ 159.004(5), 159.005(1) (providing that otherwise confidential medical information may be released to a person who bears a written consent of the patient, subject to certain requirements).

issued by an agency of this state or a motor vehicle title or registration issued by an agency of this state. Therefore, under section 552.130, the city must withhold the Texas driver's license number that appears in the submitted documents. We have marked the documents containing this information.

Next, we note that many of the submitted documents contain information that is confidential under subsection 552.117(2) of the Government Code. Subsection 552.117(2) provides for the confidentiality of current and former peace officers' home addresses, home telephone numbers, social security numbers, and family member information. We have marked the information that is excepted from disclosure under section 552.117(2). The city must withhold this information.

In regard to the birth certificate contained in the submitted documents, you argue that it is confidential under section 552.115. Birth or death records held by the bureau of vital statistics or local registration officials are excepted from required public disclosure under section 552.115 of the Government Code. However, since the birth certificate in this case is not held by the bureau of vital statistics or local registration officials, section 552.115 is inapplicable. However, much of the information contained in the birth certificate is confidential under section 552.117(2) described above. We have marked the birth certificate accordingly.

Finally, you argue that two memoranda are excepted from disclosure under section 552.111. Section 552.111 excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. An agency's policymaking functions do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. Open Records Decision No. 615 at 5-6 (1993). Additionally, section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. Open Records Decision No. 615 at 4-5 (1990). We have reviewed the two memoranda and find that these documents do not contain information related to the formulation of policy. Rather, the information in these documents pertains solely to personnel issues. Therefore, the city may not withhold either memorandum under section 552.111.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in cursive script that reads "E. Joanna Fitzgerald".

E. Joanna Fitzgerald  
Assistant Attorney General  
Open Records Division

EJF\nc

Ref: ID# 131693

Encl: Submitted documents

cc: Mr. Patrick Christopher Ruzzo  
1900 N. Loop West, Suite 500  
Houston, Texas 77018  
(w/o enclosures)